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No. 10-1491

IN THE SUPREME COURT OF THE UNITED STATES

ESTHER KIOBEL, ET AL.,
PETITIONERS

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,
RESPONDENTS

On Writ of *Certiorari* to the
United States Court of Appeals
for the Second Circuit

BRIEF *AMICI CURIAE* OF FORMER UN SPECIAL REPRESENTATIVE FOR BUSINESS AND HUMAN RIGHTS, PROFESSOR JOHN RUGGIE; PROFESSOR PHILIP ALSTON; AND THE GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW IN SUPPORT OF NEITHER PARTY

VINCENT F. O'ROURKE, JR.*
BOWDITCH & DEWEY, LLP
311 MAIN STREET
P.O. BOX 15156
WORCESTER, MA 01615
(508) 926-3424
vorourke@bowditch.com
**Counsel of Record for Amici*

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are the former Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises ("SRSG"), Professor John Ruggie; Professor Philip Alston; and the Global Justice Clinic at New York University School of Law ("NYU School of Law").[1]

Professor John Ruggie is the Berthold Beitz Professor in Human Rights and International Affairs at the Harvard Kennedy School of Government, and an Affiliated Professor in International Legal Studies at Harvard Law School. As SRSG, following six years of extensive consultation and research, including with legal experts, he authored the Guiding Principles on Business and Human Rights, which the United Nations ("UN") Human Rights Council unanimously endorsed on June 16, 2011. The Guiding Principles have enjoyed wide global uptake among businesses, governments (including the United States), and international organizations. The SRSG's reports and conclusions have been quoted and relied upon by both Petitioners and Respondents and by various *amici curiae* in this case.

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[1] This brief of *amici curiae* is respectfully submitted pursuant to Supreme Court Rule 37 in support of neither party. Pursuant to Rule 37.6, counsel for the *amici* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have filed letters of consent with the Clerk of the Court.

Professor Philip Alston is the John Norton Pomeroy Professor of Law at NYU School of Law,[2] and has over thirty years of experience working, writing, and teaching in the field of international human rights law. From 2004-2010, he was the UN Special Rapporteur on extrajudicial, summary or arbitrary executions.

The Global Justice Clinic is a clinic at NYU School of Law. The Clinic has been actively engaged in issues relating to corporate accountability for human rights abuses, and has extensively studied the body of work produced by the SRSG.

Amici have two important interests in this case. First, to provide context about the SRSG's mandate and the conclusions reached during it. Second, to correct any mistaken impressions arising from references to the SRSG's reports in the brief of Respondents or in oral argument. *Amici* have an interest in ensuring the accurate interpretation of the SRSG's work. *Amici* take no side in the present litigation, and submit this as a Brief Supporting Neither Party.

SUMMARY OF ARGUMENT

Respondents argue that there is no corporate liability under international law for the human rights violations alleged by Petitioners, including torture, extrajudicial executions, and crimes against humanity. In support of this argument,

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[2] This brief does not represent NYU School of Law's institutional views.

Respondents place significant reliance on one sentence in a 2007 report to the UN by the SRSG.

However, Respondents do not accurately represent the SRSG's views and findings.

In fact, the SRSG concluded that corporations may have direct responsibilities under international law for committing international crimes, including crimes against humanity, torture, genocide, and slavery.

In addition to examining corporate liability for international crimes in the context of his UN mandate, the SRSG was also required to examine the closely related issues of extraterritorial jurisdiction and international criminal law standards on complicity. Since the relevance of the SRSG's mandate as a whole has been placed before the Court by Petitioners and Respondents and by various *amici*, this brief also clarifies the SRSG's conclusions on these related issues. The SRSG recognized that international law requires states to protect against business-related human rights abuses within their territory and/or jurisdiction by taking appropriate steps to prevent, investigate, punish and redress such abuse. He also found that international law generally does not require, but nor does it generally prohibit, states from exercising extraterritorial jurisdiction over corporations domiciled in their territory and/or jurisdiction, provided that there is a recognized jurisdictional basis. The SRSG also concluded, in examining potential corporate liability for complicity in international crimes, that the weight of

international criminal law jurisprudence arising from cases involving individual perpetrators supports a "knowledge" *mens rea* standard for aiding and abetting human rights abuses.

ARGUMENT

I. THE SRSG RECOGNIZED THAT POTENTIAL CORPORATE LIABILITY UNDER INTERNATIONAL LAW EXISTS FOR INTERNATIONAL CRIMES

Respondents argue that corporations cannot be held liable under international law for the human rights violations alleged by Petitioners, including torture, extrajudicial executions, and crimes against humanity. Brief for Respondents at 28, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Jan. 27, 2012). In support of this argument, Respondents rely on a one-sentence statement in a 2007 report by the former SRSG.

The sentence relied on states that: "it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations."[3] Brief for

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[3] Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 44, Human Rights Council, U.N. Doc.

Respondents, *supra*, at 2, 8, 39;[4] *see also* Transcript of Oral Argument at 49:7-15, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 28, 2012). Respondents argue that this statement supports the conclusion that "international-law sources on the specific offenses at issue refute corporate responsibility." Brief for Respondents, *supra*, at 8.

However, Respondents' quotation is taken out of context and does not refer to the rest of the SRSG's conclusions on this subject. Consequently, Respondents use the statement in a manner that attributes an incorrect conclusion about potential corporate liability for human rights violations to the SRSG.

A/HRC/4/35 (Feb. 19, 2007) (by John Ruggie) [hereinafter SRSG 2007].

[4] *See* Brief for Respondents, *supra*, at 2-3 ("At the first step, international-law sources—including a United Nations report's 'conclusion [that] it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations'—recognize these norms only against States and natural persons, not against corporations.") (footnote omitted); *id.* at 8-9 ("The international-law sources on the specific offenses at issue refute corporate responsibility ... Likewise, jurists and commentators, including the [SRSG] on the issue of human rights, have concluded that international human-rights instruments do not currently impose direct responsibilities on corporations."). Respondents also cite the SRSG to support their statement that "[j]urists and commentators confirm that, when it comes to corporate responsibility for international human-rights norms, the law of nations has not yet developed a 'norm of international character accepted by the civilized world.'" *Id.* at 39 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004)).

In fact, the SRSG recognized that there may be corporate liability under international law for gross human rights abuses, including international crimes, such as genocide, torture, slavery, and crimes against humanity.

A. SRSG Report Relied on by Respondents Recognized Potential Corporate Liability for International Crimes

The statement quoted by Respondents is taken from one section of a detailed report that examined state and corporate liability under international law. Section I of the report outlined the international legal duties of states. Section II examined the international legal duties of corporations with respect to human rights violations classified as international crimes. Section III examined the international legal duties of corporations with respect to human rights violations other than international crimes. Sections IV and V addressed soft law mechanisms and self-regulation.

The quote relied on by Respondents is taken from Section III of the report. That section examined the specific question of whether treaties contained evidence of direct corporate legal liability. The SRSG reported that the international human rights treaties themselves did not address the question explicitly, that there was variance in regional treaties, and thus that "it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations." SRSG 2007, ¶¶ 36, 41–44. The SRSG's conclusion is limited on its face solely to an

assessment of liability under the treaties referenced in the section.

Respondents' brief does not make reference to Section II of the report, which addressed corporate liability beyond specific treaty regimes. In Section II, the SRSG explicitly recognized that corporations may be held directly liable for human rights violations that constitute international crimes. After reviewing the law and state practice, the SRSG found that there was "observable evidence" of "emerging corporate responsibility for international crimes." *Id.* ¶ 33. The SRSG examined developments in the area of corporate responsibility for international crimes and found that the interaction between "the extension of responsibility for international crimes to corporations under domestic law" and "the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute" has created "an expanding web of potential corporate liability for international crimes." *Id.* ¶ 22. He refuted the argument that the lack of a current international body for adjudicating corporate responsibility for international crimes points to the fact that such responsibility does not exist, stating that "just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today." *Id.* ¶ 21. The SRSG noted that corporations might "face either criminal or civil liability depending on whether international standards are incorporated into a State's criminal code or as a civil cause of action (as under the [Alien

Tort Statute, 28 U.S.C. § 1350 ("ATS")])." SRSG 2007, ¶ 27.

For these reasons, the SRSG concluded in 2007 that "the most consequential legal development" in the "business and human rights constellation" is "the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards." *Id.* ¶ 84.

A situation involving limited references to the same SRSG 2007 report cited by Respondents was addressed in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 49 (D.C. Cir. 2011), where the court noted:

> Exxon's reliance on [SRSG 2007] is misplaced. Its selective quotation from the report overlooks the salient point ... the report points to the "extension of responsibility for international crimes to corporations under domestic law," [SRSG 2007] ¶ 22, and specifically recognizes that the ATS provides such jurisdiction against corporations, *id.* ¶¶ 23, 27.

B. Six Years of SRSG Reports Show Clear and Consistent Recognition of Potential Corporate Liability for International Crimes

In addition to his 2007 report, the SRSG's reporting over the course of his six-year mandate (which includes eighteen other official reports)

demonstrates a clear and consistent recognition that corporations may be liable for international crimes.

The SRSG's first report in February 2006 states that while human rights treaties do not generally impose duties directly on corporations, "[u]nder customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labour, torture and some crimes against humanity." Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 61, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter SRSG 2006].

The SRSG's 2008 report reiterates these findings, describing the "expanding web of potential corporate liability for international crimes" and the fact that "[t]he number of domestic jurisdictions in which charges for international crimes can be brought against corporations is increasing, and companies may also incur non-criminal liability for complicity in human rights abuses." Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-*

General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶¶ 20, 74, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter SRSG 2008]. *See also* Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶ 74, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie) [hereinafter SRSG 2010].

In his final 2011 report, the Guiding Principles on Business and Human Rights, the SRSG advised business enterprises to treat the risk of causing or being complicit in gross human rights abuses as a "legal compliance issue" wherever they operate. Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Princ. 23, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter Guiding Principles].

II. THE SRSG RECOGNIZED THAT STATES ARE GENERALLY NEITHER REQUIRED NOR PROHIBITED FROM REGULATING THE EXTRATERRITORIAL ACTIVITIES OF BUSINESSES DOMICILED IN THEIR TERRITORY AND/OR JURISDICTION, WHERE THERE IS A RECOGNIZED JURISDICTIONAL BASIS

In 2011, the SRSG's Guiding Principles set out the implications of state obligations and corporate responsibilities in relation to preventing and addressing human rights abuses. The UN Human Rights Council unanimously endorsed the Guiding Principles. Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess., July 6, 2011, U.N. HRC, A/HRC/RES/17/4, ¶ 1 (June 16, 2011). The Guiding Principles operationalize the "Protect, Respect and Remedy" Framework presented to the Human Rights Council by the SRSG in 2008. The Framework rests on three interconnected pillars: (i) the state duty to protect against human rights abuses by third parties, including business, (ii) the corporate responsibility to respect human rights, which means to avoid infringing on the rights of others and to address adverse human rights impacts with which a business may be involved, and (iii) the need for greater access to effective remedy for victims of business-related human rights abuses.

The Guiding Principles affirm the SRSG's prior statements that "[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business

enterprises." Guiding Principles, Princ. 1. Where such abuse does occur, states "must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that ... those affected have access to effective remedy." *Id.* Princ. 25. The SRSG has noted that remedies for business-related human rights abuses may come in many forms, including "civil, administrative or criminal liability." *See id.* Princ. 7 cmt. The Guiding Principles also provide that states "should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses." *Id.* Princ. 26. During his six-year mandate, the SRSG referred to the ATS as one of the various remedial avenues available to those alleging business-related human rights harms. *See* SRSG 2010, ¶ 75; SRSG 2008, ¶¶ 90–91; SRSG 2007, ¶¶ 24–25, 27; SRSG 2006, ¶¶ 62–64.

The SRSG recognized that states are permitted to regulate the extraterritorial activity of corporations domiciled in their territory and/or jurisdiction where there is a recognized jurisdictional basis. The Commentary to his final Guiding Principles specifically provides that while states may not be "required" to regulate the extraterritorial activity of businesses domiciled in their territory and/or jurisdiction, they are not "generally prohibited from doing so." Guiding Principles, Princ. 2 cmt. It also notes that, "[w]ithin these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction." *Id.*

III. THE SRSG RECOGNIZED THAT THE WEIGHT OF INTERNATIONAL CRIMINAL LAW JURISPRUDENCE ADDRESSING INDIVIDUAL PERPETRATORS SUPPORTS A KNOWLEDGE STANDARD FOR AIDING AND ABETTING LIABILITY

As early as his first report in 2006, the SRSG recognized that "customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or complicity in, the most heinous human rights violations amounting to international crimes." SRSG 2006, ¶ 61.

In examining the relevant standard for aiding and abetting liability, the SRSG's detailed reviews of international law found that the weight of international criminal jurisprudence in cases involving individual perpetrators supports "knowledge" as the *mens rea* standard for aiding and abetting. In his 2006 report, the SRSG recognized that the knowledge test "is widely thought to be the current state of international law on this subject." SRSG 2006, ¶ 72 (commenting on the complicity criteria set out by the Ninth Circuit in *Doe I v. Unocal Corp.*, 395 F.3d 932, 937 (9th Cir. 2002)). The SRSG observed that the Second Circuit's *Talisman* opinion, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 249 (2d Cir. 2009), in its requirement that corporate aiders and abettors have a *mens rea* of intent, was "against the weight of international legal opinion" as it applies to individual perpetrators, and further cautioned about the effects of applying that standard to companies.

He noted: "as long as an I.G. Farben intended only to make money, not to exterminate Jews, [the *Talisman* standard] would make it permissible for such a company to keep supplying a government with massive amounts of Zyklon B. poison gas knowing precisely what it is used for." John G. Ruggie, Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corps. And Other Bus. Enters., Remarks for ICJ Access to Justice Workshop (Oct. 29, 2009).

In his UN reports, the SRSG surveyed the relevant sources of international law, and found a "fairly clear standard" for individual aiding and abetting liability. SRSG 2007, ¶ 31. The standard he described does not require the actor to "share the same criminal intent as the principal, or even desire that the crime occur." Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Clarifying the Concepts of "Sphere of Influence" and "Complicity": Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 42, A/HRC/8/16 (May 15, 2008) (by John Ruggie). Rather, the perpetrator must "know the criminal intentions of the principal perpetrator" and act to "provide substantial assistance to the commission of the crime." *Id.* ¶ 42. The SRSG recognized that caution should be exercised "when analogizing standards from individuals to companies," but stated that international law standards are relevant for two reasons: "[f]irst, these standards can provide

guidance to domestic criminal courts, some of which allow for criminal prosecution of companies. Second, international criminal law can directly influence domestic non-criminal legal proceedings involving companies." *Id.* ¶ 34.

In the Guiding Principles, the SRSG concluded that the "weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime." Guiding Principles, Princ. 17 cmt.

CONCLUSION

The Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises recognized that corporations may have direct liability under international law for gross human rights abuses, including international crimes such as genocide, torture, slavery, and crimes against humanity.

The SRSG also concluded that states are generally not required to—but nor are they prohibited from—regulating the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction, where there is a recognized jurisdictional basis, and that the weight of international criminal law jurisprudence in cases involving individual perpetrators supports a knowledge standard for aiding and abetting human rights abuses.

Respectfully submitted,

VINCENT F. O'ROURKE, JR.
BOWDITCH & DEWEY, LLP
311 MAIN STREET
P.O. BOX 15156
WORCESTER, MA 01615
(508) 926-3424
vorourke@bowditch.com
Counsel of Record for Amici

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